Nos. 12217 and 12221.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12217

SAMUEL HARRY KASINOWITZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and CONSOLIDATED CASES.

No. 12221

LILLIAN ADELE DORAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

and CONSOLIDATED CASES.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

Introduction.

Appellants file herewith their brief in reply to the brief for appellee. Under the terms of the order of this court entered upon the stipulation of the parties this brief was due seven days from receipt by appellants' counsel of a

typewritten copy of appellee's brief, or, on June 14, 1949. By order, on application of appellants' counsel, this time was extended to and including June 21, 1949.

In accordance with the stipulation of the parties approved by the court the causes are to stand submitted upon the filing of this brief, without oral argument unless the same be directed by this court.

As the brief was being printed counsels' attention was for the first time directed to a recent decision of the United States Supreme Court in *Smith v. U. S.*, No. 292, Oct. Term, decided May 31, 1949 (17 L. W. 4448), which, they submit, decisively supports appellants and disposes of the government's contentions on this appeal. It is discussed, *infra,* pages 5 to 7. The court's attention is urgently invited to this opinion.

I.

It Is the Purpose of the Privilege Against Self-Incrimination to Protect Witnesses Against Compelled Disclosures That Would Expose Them to Prosecution by Virtue of the Danger That the Fact Disclosed Might Constitute Part of the Chain of Proof of a Crime or Lead to the Discovery of Such Proof. Its Protection Is Not Restricted to Compelled Disclosures That Might "Complete a Chain of Proof Necessary to Convict" or That Might Constitute "a Necessary and Essential Part of a Crime." (Appellee's Brief p. 17; Appellee's Brief, Alexander, p. 12.)

The government's position is that a witness may claim his privilege against self-incrimination only against disclosure of a fact "which may complete the chain of evidence necessary to convict him or which is a necessary and essential part of a crime." (See Appellee's Brief p. 17; Appellee's Brief, Alexander, p. 12.) In effect the government urges that the privilege is available only when it serves to shield an answer that would bring about a *conviction* of crime.

The authorities on the other hand hold that it is the function of the privilege to protect a witness from giving answers that expose him to criminal prosecution, irrespective of whether such a prosecution will or might result in conviction:

> "The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence. that no one shall be compelled to give testimony *which may expose him to prosecution for crime.* It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or

> even tend to disgrace him; *but the line is drawn at testimony that may expose him to prosecution.*" (Emphasis added.) *Hale v. Henkel,* 201 U. S. 43, 66, 50 L. Ed. 652, 662.

If the test were that the disclosure could be used to convict then the privilege would be satisfied by an immunity statute which prevented use of the testimony against the witness in any criminal case. For then the testimony could not become part of the "chain of evidence necessary to convict." But this was rejected at least as early as *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110. In that case the immunity statute provided that the witness' answers could not "be given in evidence or in any manner used against" him in any criminal case (142 U. S. p. 560, 35 L. Ed. p. 1113). But the court held that this was not enough because it did not protect the witness from the risk of prosecution resulting from the use of his answers "to search out other testimony to be used in evidence against him or his property in a criminal proceeding" (142 U. S. p. 564, 35 L. Ed. p. 1114). The privilege, the court reasoned, protects witnesses from exposure to prosecution resulting from their answers. This protection extends not simply to admissions of guilt of or an element of the crime but to the disclosure of any fact which can be linked with other facts to prove guilt or used in the discovery of such facts. Since the privilege gives this protection it can be replaced only by an immunity statute which gives the same protection:

> "We are clearly of the opinion that no statute which leaves the party or witness *subject to prosecution after he answers the criminating questions* put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statu-

> tory enactment, to be valid must afford *absolute immunity against future prosecution* for the offense to which the question relates. In this respect we give our assent . . . to the doctrine of Emery's Case.* . . ." (Emphasis added.) 142 U. S. pp. 585-6, 35 L. Ed. p. 1122.

This principle was fully approved and re-asserted in *Brown v. Walker,* 161 U. S. 591, 40 L. Ed. 819. It was not qualified or restricted in the manner the government suggests (Appellee's Brief, Alexander, p. 12). Rather the court set forth the portion of the *Counselman* opinion quoted just above and concluded, "The inference from this language is that if the statute does afford *such immunity against future prosecution,* the witness will be compellable to testify." (Emphasis added.) (161 U. S. p. 594, 40 L. Ed. p. 820.) Then, finding that the immunity statute before it "fully accomplished" this "object" of the privilege, the statute was upheld and the witness coerced to answer (161 U. S. p. 610, 40 L. Ed. p. 825).

The law of *Counselman v. Hitchcock, supra,* and *Brown v. Walker, supra,* has been fully approved and applied by the United States Supreme Court, in a unanimous opinion, only within the last few weeks, *Smith v. United States,* No. 292, October Term 1948, decided May 31, 1949, 17 L. W. 4448. Because of the controlling im-

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*It is this very doctrine which the government attacks, claiming that it affords "no definite guide for lower courts" (Appellee's Brief, Alexander, p. 11). On the contrary the principle establishes a complete guide which has been repeatedly applied. *Brown v. Walker,* 161 U. S. 591, 40 L. Ed. 819; *Arndstein v. McCarthy,* 254 U. S. 71, 65 L. Ed. 138; *Ex Parte Irvine,* 74 Fed. 954; *United States v. Rosen,* 2 Cir., ... F. 2d ...., No. 209—October Term 1948, dec. April 25, 1949; *Smith v. United States,* U. S. S. Ct. No. 292—October Term, 1948, dec. May 31, 1949.

portance of this decision upon the case at bar we discuss it here at some length. In the *Smith* case the defendant had been convicted of violations of the Emergency Price Control Act and the Second War Powers Act. Prior to his prosecution he had been compelled to testify at an examination under the Price Control Act before an examiner of the OPA. In that proceeding he testified concerning "the organization of his business, his use of priorities, his suppliers and customers, his banking connections and the method of computing the selling price of surplus materials" (17 L. W. 4451). The Price Control Act contained an immunity provision similar to that in *Brown v. Walker, supra,* but conditioned upon the witness' claim of privilege. Smith claimed his privilege and then testified as indicated. Thereafter informations were returned against him alleging violations of the Second War Powers Act and the priority regulations thereunder and an indictment was brought for conspiracy to sell finished piece goods in excess of prices fixed under the Price Control Act. By motion to dismiss Smith claimed that he had immunity against such prosecution by reason of his testimony before the OPA examiner. The Supreme Court upheld his position.

In so holding the Supreme Court squarely rejected the position advanced by the government here and with equal directness approved the position urged by appellants. At the outset it should be observed that in the court's discussion it equates Smith's claim of immunity to a claim of the privilege because under the *Counselman* and *Brown* cases, *supra,* they were coextensive—the more so in the *Smith* case because the statute provided that immunity would attach only where the witness first claimed his privilege. Smith's claim of immunity had been rejected in the

trial court because "the testimony [*i. e.*, before the OPA examiner] does not prove any part or feature of the commission of a crime, nor will it tend to a conviction when combined with proof of other circumstances which others may supply."* This, the Supreme Court held was not the test. The true test was held to be that laid down in *Counselman v. Hitchcock:*

> ". . . Through *Counselman v. Hitchcock,* 142 U. S. 547, it was established that absolute immunity from federal criminal prosecution for offenses disclosed by the evidence must be given a person compelled to testify after claim of privilege against self-incrimination. To meet that requirement Congress amended the immunity provisions of the Interstate Commerce Act, 24 Stat. 383, Sec. 12, that protected a witness from use against him of evidence so given in any subsequent criminal proceeding so as to provide that the witness should not be 'prosecuted . . . for or on account of any transaction, matter or thing, concerning which he may testify . . . P. 4, *supra.* This remission of responsibility for criminal acts met the 'absolute' test if the constitutional provision against self-incrimination. *Brown v. Walker,* 161 U. S. 591. If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself."—17 L. W. 4451.

Thus, has the Supreme Court with finality laid to rest the government's contention here. The immunity statute to be valid must be coextensive with the privilege.

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*This the *verbatim* ruling of the trial court set forth in the Supreme Court's opinion (17 L. W. 4451).

That is, it must protect a witness from exposure to prosecution with respect to "any transaction, matter or thing, concerning which he may testify" to incriminating disclosures. Only in this way can the witness be protected from being, in the words of the Constitution, "a witness against himself." Therefore, as the court holds, the privilege itself affords the witness protection against giving answers which may expose him to prosecution. It is the risk of prosecution against which the privilege protects, not as the government asserts, the giving of proof necessary to convict.

But the court went further. Laying down this ruling, it followed the *Counselman* opinion in adopting the "doctrine of Emery's Case." It held that answers which expose to prosecution are answers which might disclose a fact which could constitute a link in the probative chain or provide leads to the discovery of such evidence. After setting out Smith's testimony, or its substance, the court held that he had obtained his immunity, because

> ". . . The facts brought out in his examination are not facts disassociated from his prosecution as in *Heike v. United States,* 227 U. S. 131, but in the language of the Compulsory Testimony Act are pertinent to the prosecution and 'concerning which' petioner testified. The facts were links in the chain of evidence."—17 L. W. 4451-2.

The government contended that Smith did not have immunity so far as the indictment for conspiracy to violate the Price Control Act was concerned since his answers were "exculpatory" in that they denied violation of that act and gave facts consistent with such a denial. But Smith's answers had also given considerable information with respect to the concerns with which he had dealt,

his manner of dealing, his banker, etc. While his testimony contained no admission of a crime or, in the government's words here, no disclosure of a "necessary and essential part of a crime," it did fall within the privilege and therefore within the immunity statute because it could have furnished leads to the discovery of proof of the crime. For this reason the court found it unnecessary to determine whether exculpatory testimony would invoke the statutory immunity:

> ". . . Certainly many of these disclosures furnished leads that could have uncovered evidence of the unlawful conspiracy charged in the indictment." —17 L. W. 4453.

Nor do the authorities cited by the government support its position. The government does not, because it can not, derive sustenance from the actual holding in *Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954.* There the claim of privilege was asserted to questions propounded to witnesses in the course of a criminal trial calling for their knowledge of the business activities of the defendants. It had already been testified that the defendants were participants in a gambling ring operating in two states and that the witness had frequently carried "matter" between the defendants' offices. The claim of privilege was upheld on the grounds that the witnesses' admission of knowledge of the business activities of the defendants could be used to show that the defendants were engaged in gambling activities, and this, together with the testimony that the witnesses had carried "matter" between the defendants' offices, "would seem to be a circumstance of the greatest evidential importance in proving the complicity of the wit-

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*Cited in Appellee's Brief, Alexander, page 12, *et seq.*

nesses in violations of the interstate commerce regulations . . . to show that the places between which they were constantly carrying matter were places where matter of the forbidden character would be needed and used" (*id.* p. 963). The same immunity statute as that involved in the *Counselman* case would have prevented these answers from being used to convict. But because the answers would leave the witness "subject to prosecution after he answers the criminating question" the claim of privilege was upheld. The *Irvine* case is a square rejection of the government's contention that the privilege protects only when the answer supplies facts "necessary to convict."

But the government would hide the holding of the *Irvine* case behind certain language excerpted from the court's opinion therein. (See Appellee's Brief, Alexander, pp. 12-3.) The court observes that the privilege will not protect disclosures which would be incriminating only "upon some imaginary hypothesis." Or, to use the words of Wharton which the court quotes, the privilege does not extend to an answer which might "become part of a supposeable concatenation of incidents from which criminality might be inferred." At best these were general observations which did not govern the actual decision of the case. They simply formulate the requirement that the claim of privilege be supported by facts showing a reasonable likelihood of danger to the witness. Obviously the witness may not rely on sheer speculation where fertility of imagination replaces facts and reason. Indeed, read in its entirety this passage supports the position of appellants and rejects the government's. For in it the court states that the danger to the witness must be determined upon the nature of the question and the "facts adduced" in support of the privilege and the danger exists when (in words of Wharton approved by the court)

"there is reasonable ground to apprehend that, should he answer, he would be *exposed to a criminal prosecution*" (emphasis added) (*id.* p. 960).

The reasoning of Judge Taft in the passage from the *Irvine* case just discussed provides the key to a proper evaluation of *Mason v. United States,* 244 U. S. 362, 61 L. Ed. 1198, and *Regina v. Boyes,* 1 Best and S. 311. In the *Mason* case the court had before it no facts to show the "setting" of the questions and their incriminatory effect. It had to determine the claim of privilege on the face of the questions alone. Since card playing of itself was not a crime under the statute it held that an admission of seeing a game of cards being played would not have been incriminating. The absence of facts indicating the danger to the witness left simply an "imaginary hypothesis" or a "supposeable concatenation of incidents" to support the witnesses' claims. The privilege does not operate abstractly but only concretely in the actual situation of the witness at the time the question is asked. The court was provided with no facts by which it could perceive a reasonable possibility of exposure to prosecution.

Regina v. Boyes, supra, is a classic example of the "imaginary hypothesis" which the courts reject. There the witness claimed his privilege notwithstanding a grant of immunity by asserting that it did not protect him from impeachment by Parliament. He did not show that he was a member of that body or a candidate for election thereto or any other reasonable forseeability that he would ever become a member of that body. These facts negative any tangible possibility of exposure to prosecution leading to his impeachment by his answer, and the privilege would not lie.

Both the *Mason* and the *Boyes* cases therefore present a question not involved here—*viz.,* whether the claim of privilege must be observed simply because a witness claims it. The court in each case laid down the rule that it is for the court to determine the validity of the claim on the nature of the question and the facts adduced by the witness. Appellants of course concede this to be the law. They have proceeded on this basis and have made their showing of the danger to them. Their case differs from the *Mason* and *Boyes* cases because their showing indicates that appellants have a rational basis for fearing danger of prosecution if they are forced to answer questions disclosing association with the Communist Party. Having shown this, they have established their right to claim the privilege.

The excerpt from Wigmore (Appellee's Brief, Alexander, p. 16) goes to the same point.*

In the instant case the court is not faced with the "imaginary hypothesis" situation found in the *Mason* and

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*Additionally it should be noted that the *holding* in the *Willie* case (25 Fed. Cas. 38) is not limited in the manner indicated by Dean Wigmore in the excerpt quoted by the government. Chief Justice Marshall *held* that the witness had no privilege not to disclose present knowledge of the cypher because present knowledge would not "justify the inference that his knowledge was acquired previous to this trial, *or afford the means of proving that fact*" (emphasis added) (25 Fed. Cas. p. 40). In the same passage the Chief Justice refers to the possibility of the answer "implicating the witness." Earlier in the opinion he states that it is the function of the privilege to protect a witness from disclosing a single fact of itself "unavailing" but which together with others would provide the means whereby the witness would be "exposed to a prosecution." "The rule which declares that no man is compellable to *accuse* himself would most obviously be infringed by compelling a witness to disclose a fact of this description" (25 Fed. Cas. p. 40). The *Willie* case rests upon the same concept of the privilege as the *Counselman* case and supports appellants, not the government, in the case at bar.

Boyes cases, *supra.* On the contrary there are before it facts from which a rational, factual hypothesis of exposure to prosecution is inescapably present. Appellants showing below was that there is a statute making it a crime to advocate the overthrow of the government by force and violence, to belong to an organization that so advocates, to be affiliated with such an organization, to abet such an organization, to help form or organize it, or to conspire to do any of these things; that the responsible law enforcement officers of the federal government have determined the Communist Party to be such an organization and have instituted prosecutions against its national leaders for conspiring to form it and for being members of it; that it has been "reported from an apparently responsible source" [R. 305] that the Department of Justice was, at the time appellants were interrogated, about to launch a nationwide drive of prosecutions against members of the Communist Party under the Smith Act and had convened federal grand juries in Los Angeles and elsewhere to this end; that the press carried statements attributing, in direct quotes, to the prosecutor handling this inquiry the statement that this grand jury had summoned these appellants for an investigation leading to prosecution of members of the Communist Party in Los Angeles; that answers to the questions put to appellants would disclose such knowledge of the inner relationships and activities of the Communist Party as to constitute a link in the chain of proof of membership in it or affiliation with it or abetting it, or the means of discovering such proof. This showing indicates a real and pressing danger of prosecution which the government can not deny. Indeed it has made no effort to deny the effect of appellants' showing but rather contents itself with pressing upon this court arguments concerning the scope

of the privilege which were rejected as early as *In re Willie, supra.*

One further consideration shows the error of the government's position. If the privilege could be claimed only when the disclosure demanded of the witness might be such as to "complete the chain of evidence necessary to convict" it would be his burden to support his claim of privilege by showing that all other proof of the crime exists and is available to the prosecutor and that his answer would in effect supply the missing link. Were this the law the privilege would be utterly worthless. These cases most frequently arise out of grand jury investigations. Under these circumstances the grand jury record is secret and the information which the prosecutor has developed through investigation is confidential information.* The witness would therefore be unable to sustain the burden cast upon him for unless he could show the evidence available to the government he could not begin to show that only his answer was lacking from an otherwise completed line of proof. But the claim of privilege also arises in non-criminal tribunals such as immigration hearings, bankruptcy proceedings or civil trials. Under these circumstances the disclosures called for may never have been involved in any criminal in-

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*That this comports with the facts may be seen from the record here when appellants sought to show the basis of their fear of prosecution by questioning the prosecutor. All questions seeking to elicit the facts on the grand jury record or in the possession of the prosecutor were met with the objection that they called for "confidential" or "secret" information. These objections were uniformly sustained [R. 252-283, *passim.*].

vestigation. It would be impossible to show that a prosecutor had developed a completed line of proof but for the fact contained in the witness' answer because this had never been undertaken. Again the privilege would be worthless if the government's position were the law. The same can be said of testimony before legislative committees.

Furthermore this construction of the privilege would require a witness to present all of the testimony against himself, except a single missing link, as a condition of refusing to testify against himself. The privilege against self-incrimination would become the means whereby the government would compel a witness to prove the case against himself. Then, indeed, would the privilege be destroyed for the witness would be "forced to disclose those very facts which the privilege protects" (*United States v. Weisman,* 2 Cir., 111 F. 2d 260, 262).

These considerations impel, we submit, a rejection of the government's position. The only test can be whether the facts which the witness might disclose can, under the circumstances he establishes be coupled with other facts to create a danger of prosecution. If the government's position were adopted the availability of the privilege would turn on the extent to which a prosecutor had already prepared a case against him and the witness' ability to prove his own guilt. The cases show that it is the purpose of the privilege to protect the witness from disclosing facts which might reasonably create a risk that a prosecutor would undertake to prepare a prosecution.

II.

Appellants' Showing Established a Reasonable Likelihood of Danger to Them Personally. Their Showing Consisted of Evidence Which Was Competent to Show This Danger and the Reasonableness of Their Fear of Crimination; It Cannot Be Dismissed as "Offers to Prove" and "Hearsay Evidence." (See Appellee's Brief pp. 11-12.)

(a) Appellants' Showing Consisted of Competent Evidence, and All of It Was Admissible Under the Cases to Show the Reasonableness of Appellants' Fear of Crimination.

Appellants' showing (see the summaries thereof in Appellants' Opening Brief, pp. 14-26, 39-42) consisted of uncontradicted evidence that the grand jury was investigating the Communist Party. The very questions put to appellants show this.* The prosecutor admitted that he was trying to establish before the grand jury the whereabouts of the membership list and that he subpoenaed and interrogated appellants because he had reason to believe he could obtain from them this information [R. 287, 280-1]. This evidence shows that the prosecutor had information that the appellants were so connected with the Communist Party as to be able to disclose the whereabouts of the membership records. Answers to the questions therefore might well provide the link necessary to establish membership or affiliation within the meaning of the Smith Act.

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*See, *e. g.*, the questions concerning names of officers of the Communist Party, table of organization of the Communist Party, who in the Communist Party is in charge of membership or membership rolls (Appellants' Opening Brief, Appendix A-2).

Appellants offered competent, admissible evidence that the Communist Party, with which the questions would have linked appellants, was deemed by the government to be an organization in violation of the Smith Act. The offer consisted of duly certified copies of indictments returned in the United States District Court for the Southern District of New York charging the members of the national committee of the Communist Party [*cf.* R. 291] with two crimes:

> (1) a conspiracy "to organize as the Communist Party of the United States of America a society . . . of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" [Ex. A, R. 327-8]; and
>
> (2) mere membership in that party [Ex. B, R. 331].*

This evidence was rejected as immaterial. It was clearly material and should have been received. This court may regard it as having been admitted. (*United States v. Weisman,* 2 Cir., 111 F. 2d 260, 262).

The record further discloses that the prosecutor and the grand jury actually directed this inquiry into possible violations of the Smith Act. Appellants Blair, Brodsky, Caress and Spector were asked whether they knew of any person in Los Angeles County who advocated the overthrow of the government of the United States by force and violence and whether they knew of any organization in Los Angeles County that had that purpose. (See

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*Apparently the government now admits that the Attorney General has found that the Communist Party advocates overthrow of the government by force and violence (Appellee's Brief p. 16).

Appellants' Opening Brief, App. A-2, Questions 14 and 15.) In addition, appellants offered much evidence to show a reasonable basis for their fear that the inquiry before which they were called was in fact conducted to obtain information upon which indictments under the Smith Act could be obtained against Communist Party members or affiliates similar to those returned in New York. While this showing is summarized in Appellants' Opening Brief (pp. 18-26) it will be well to recall here that it included this: newspaper reports that the Department of Justice had launched a nationwide drive against the Communist Party and its members under the Smith Act; that it had announced the impanelling of federal grand juries in Los Angeles and other cities to this end; that the prosecutors involved in the inquiry before which appellants were called made public statements that the inquiry was the "opening gun" in an investigation of "Communist groups and activities" and "subversive and disloyal groups." [See R. 302, 304, 166-180; Ex. D, Idf. R. 335-6; Ex. E, Idf. R. 337; R. 308; Ex. I, Idf. R. 305-6; all of this is summarized in Appellants' Opening Brief pp. 18-26.]

While the last mentioned items of evidence were newspaper articles and are therefore not competent evidence of the facts therein stated, they are competent to show the information available to appellants and the reasonableness of their fear of prosecution. This kind of proof has been specifically approved by the Second Circuit for purposes of showing the genuineness of the peril (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262). Moreover here the newspaper articles, in the main, purport to be straight reporting and claim authoritativeness from high sources in the Department of Justice or actually

quote the prosecutor handling the very inquiry before which appellants were summoned. They rise above the "irresponsible gossip" held competent to show the danger of prosecution in the *Weisman* case, *supra,* page 262.

(b) Appellants' Showing, Contrary to the Government's Contentions (Appellee's Brief pp. 15-16) Indicates a Genuine and Reasonable Likelihood of Peril to Them Individually.

The government, with more temerity than reason, asserts that appellants are, in effect, witnesses "chosen at random without regard to who . . . [they] . . . might be or what . . . [they] . . . might know . . ." (Appellee's Brief p. 16). This assertion flies in the very teeth of Mr. Carter's sworn testimony that he selected these appellants for interrogation because he had reason to believe they could give him information as to the "whereabouts of the Los Angeles County Communist Party membership records" [R. 280-1]. Appellants were not chosen at random. No prosecutor would endeavor to find out how to locate the membership records of an organization through witnesses "picked at random from any place" (Appellee's Brief p. 16). He would select people who are part of the organization, people who hold positions of sufficient responsibility in the organization to be able to tell him where the records could be found. It is an inescapable inference from Mr. Carter's testimony, viewed in the light of what one would expect from a reasonable man in his position, that he selected appellants for subpoena and interrogation because he had information not only that they were members of the Communist Party but that they held such positions in it that they knew who kept the membership records and where they

were. To infer less would force one to the conclusion that Mr. Carter would attempt to locate the Communist Party membership records by a random selection of citizens in the community, persisted in, perhaps, until every resident had been questioned.

It is therefore plain that appellants' showing indicated their possible connection with the Communist Party, and the extent to which answers to the prosecutor's questions would establish this connection, as a matter of fact, out of their own mouths. In their opening brief herein (pp. 27-38) appellants set forth the manner in which their answers to the question put to them might provide evidence of their connection with the Communist Party or the means of discovering it. To none of this has the government ventured an answer.

Still, the government disingenuously asks, where is the danger of prosecution? To this we say that if the Attorney General will prosecute citizens in New York for mere membership in the Communist Party [see Ex. B, R. 331] he may very well do the same in Los Angeles. Indeed, the newspapers indicated that this was definitely projected [Ex. D, Idf. R. 335-6; Ex. E, Idf. R. 337; Ex. I, Idf. R. 305-6]. They further carried reports that the prosecutor in charge of this very inquiry let it be known that the grand jury was embarking upon a "top to bottom" investigation of "Communist groups and activities" and that "evidence of Communistic activities" would lead to prosecution "if sufficient" [R. 302, 304]. Neither Carter nor Goldschein on this record denied or explained these statements. Finally, if the Attorney General makes a determination that the Communist Party advocates over-

throw of government by force and violence,* it is no more than reason requires to assume that he will act on this conclusion in all respects that his law enforcement responsibilities dictate. That he would so determine and not prosecute under the Smith Act is not only unthinkable but contrary to all the advices reaching the press from the Department of Justice and the White House. [See Ex. D, Idf.; Ex. E, Idf.; Ex. I, Idf., *supra;* Ex. K, Idf. R. 339; R. 308.]

Thus, to appellants, whom the prosecutor believed to be high placed members of the Communist Party in Los Angeles County, the risk of prosecution on the basis of their answers was as direct, immediate and pressing as the cases require. The government's contentions to the contrary ignore the very facts upon which its counsel involved appellants in the investigation.

(c) The Cases Require That the Witness Show Only That the Peril of Prosecution Is a Reasonable One. Contrary to the Government's Arguments, There Is No Requirement That the Witness Be Under Investigation or in Such a Position That Prosecution "Develop Out of the Activities of the Very Grand Jury Before Which the Questions Were Propounded." (Appellee's Brief p. 22.)

The government contends that the test of whether the privilege may properly be claimed is whether "prosecution of the witness was likely to develop out of the activities of the very Grand Jury before which the questions were propounded" (Appellee's Brief p. 22). The government's position is that the witness may not claim his privilege unless he himself is in effect under investigation by the

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*Which appellants offered to prove [R. 311] and the government now admits (Appellee's Brief p. 16).

grand jury. The government does not correctly state the law. This branch of the argument will show, *first*, that the witness may claim his privilege before any tribunal having power to summon him, and, *second*, that the claim of the privilege turns on the probative value of the witness' possible answer under the circumstances disclosed.

It was held as early as *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, that the object of the constitutional provision is "to insure that a person should not be compelled, *when acting as a witness in any investigation*, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters but it is as broad as the mischief against which it seeks to guard" (emphasis added) (142 U. S. p. 563, 35 L. Ed. p. 1114).* As was stated in *Wilson v. United States*, 221 U. S. 361, 379, 55 L. Ed. 771, 778:

> ". . . The privilege holds although the pursuit of the person required to produce has not yet begun; it is the incriminating tendency of the disclosure, and not the pendency of the prosecution against the witness, upon which the right depends. Counselman v. Hitchcock, 142 U. S. pp. 562, 563, 35 L. ed. 1113, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195."

The Fifth Amendment, then, protects against compulsory disclosure of facts incriminating to the witness in any type of proceeding, if in a criminal case it may be used in the proof to obtain a conviction or to discover such proof. For it is the purpose of the amendment to protect individ-

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*Later in the same opinion Justice Blatchford observed, "It is an ancient principle of the law of evidence, *that a witness shall not be compelled, in any proceeding*, to make disclosures or to give testimony which will tend to criminate him . . ." (emphasis added) (142 U. S. p. 564, 35 L. Ed. 1114).

uals from being forced to give from their own lips evidence upon which a prosecution might be based, or from which it may result. Following this principle the courts have upheld the claim of the privilege in proceedings where the witness was obviously *not* under investigation for the commission of crime and where the questions were *not* propounded in the course of any inquiry into criminal activities, so that there was absolutely no possibility that, in the government's words, "prosecution was likely to develop out of the activities of the very Grand Jury before which the questions were propounded." The cases are collated in appellants' brief in the *Alexander* case (App. Br. Alexander pp. 44-5).

The true test of whether the privilege is properly claimed is the probative relationship between the witness' possible answer and the incrimination he fears. By this is meant whether the answer which the witness might give would constitute (1) an admission of that crime or of an element of it, or (2) a link in the chain of proof of the commission of that crime, or (3) a means of discovering such proof. *In re Willie,* 25 Fed. Cas. 38; *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110; *Ballmann v. Fagin,* 200 U. S. 186, 50 L. Ed. 433; *Arndstein v. McCarthy,* 254 U. S. 71, 65 L. Ed. 138; *Foot v. Buchanan,* (C. C. Miss.) 113 Fed. 156; *Ex Parte Irvine,* 74 Fed. 954; *United States v. Zwillman,* 2 Cir., 108 F. 2d 802; *United States v. Weisman,* 2 Cir., 111 F. 2d 260; *United States v. Cusson,* 2 Cir., 132 F. 2d 413; *United States v. Rosen,* 2 Cir., ... F. 2d ...., No. 209—October Term 1948, dec. April 25, 1948; *Smith v. United States,* U. S. S. Ct. No. 292—October Term 1948, dec. May 31, 1949.

Some questions on their face call for an answer which may be incriminating. Thus when Counselman was asked

whether he had ever obtained a railroad rate for the shipment of grain at less than tariff rates (142 U. S. p. 549, 35 L. Ed. p. 1111) he was called upon to admit or deny a crime. The probative effect of his possible answer was easily perceived. When he was asked whether he knew others doing this (142 U. S. p. 550, 35 L. Ed. p. 1112) his answer might have provided a link in the evidentiary chain to sustain a prosecution for the same kind of crime or provided the means of discovering such evidence. But in either case the probative usefulness of his possible answer was plain because the question in each case described a specific type of criminal activity.

Other questions examined on their face alone call for answers which appear to present no peril to the witness. There the witness' claim of the privilege had to be supported by a presentation of additional facts so that the court could perceive the probative effect of the possible answer in spelling out a sufficient connection with crime to expose the witness to prosecution. A clear example is *Ex Parte Irvine, supra,* where the witnesses, as here, were asked concerning their knowledge of allegedly unlawful activities of others. The court (p. 594) linked up the witness' possible answers with other testimony, given in the trial at which the witnesses were called to testify, to show that an apparently harmless question might produce an answer that would give rise to a risk of prosecution. In doing this the court evaluated the probative potential of the witnesses' possible answer and found that it was sufficient to expose them to prosecution.

The *Zwillman, Weisman, Cusson* and *Rosen* cases, *supra,* present this problem in a form extremely close to the situation at bar. In each case the questions dealt with

a connection between the witness and other persons;* they were directed at establishing an association between the witness and the others. In each case the court observed that such an association was innocent enough on its face in the absence of facts showing such association to have a possible criminal character. The witnesses claiming the privilege in those cases showed a likelihood that these other persons were involved in a criminal conspiracy. Thus, in *Zwillman's* case, *supra,* the witness admitted having been engaged in the liquor business during the time for which he was asked to name his business associates. The statute of limitations and the repeal of the National Prohibition Act saved him from prosecution as a bootlegger. But there remained the possibility of prosecution for conspiracy to violate the revenue laws relating to liquor, such as affixing stamps, paying taxes, etc. To admit his business associates the witness would have given an item of evidence which could be used in the chain of proof of conspiracy, *i. e.,* concerted action with others. The facts shown by him with reference to his liquor business in the period asked about could be added to other evidence to establish that the conspiracy was to violate revenue laws relating to liquor. From this it was apparent to the court that for Zwillman to acknowledge the associations inquired about raised a serious danger of prosecution. The facts which his answers might give had probative value taken together with other facts made known to the court in the direction of proving the crime for which he said he feared prosecution.

Similarly with the *Weisman* case, *supra.* Weisman was asked whether he knew persons who visited, lived in

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*In the *Rosen* case the questions dealt with the witness' connection with an automobile. The issue is the same.

or stayed at Shanghai in certain years. He showed that the prosecutor had caused to be indicted a narcotics ring which operated between Shanghai and New York in those years and that the newspapers carried a story to the effect that a man who was described so as to resemble Weisman would be indicted in connection with the operation of that ring. With these facts the court could see that if Weisman acknowledged association with the persons inquired about his answer might have connected him with the conspiracy. Again it was the probative value of his possible answer in establishing association with persons involved in an allegedly unlawful conspiracy which indicated the possible exposure to prosecution from answering.

The *Cusson* case, *supra,* is strikingly similar to the one at bar. The question was directed at association between the witness and others at a time when the prosecutor evidently thought them engaged in a conspiracy to obstruct justice. The question, contrary to the government's assertion (Appellee's Brief p. 19) did not ask Cusson to divulge whether the Groveses had asked her to leave the country. It merely asked whether she had met with the Groveses just prior to their trial. The "setting" offered in support of her claim of privilege, such as her absence from the country from just before the trial until its close and the prosecutor's query whether she had been subpoenaed for it, permitted the court to see that there were other facts which, taken with an acknowledgment of association with the Groveses, would create such a chain of evidence as to make prosecution likely.

In the *Rosen* case, *supra,* the effect of the questions was to elicit whether the witness had been connected with a car which had figured prominently in one or more alleged conspiracies. Because the showing there, as in the pre-

ceding cases, indicated the nature of the conspiracy the court could see that an answer connecting Rosen with the car might connect him with the conspiracy.

The trivia urged by the government to distinguish these cases (Appellee's Brief pp. 17-21) denote differences that make no distinction. In each case the court examined the facts before it to ascertain whether an answer to the questions put could be linked with other facts in the chain of proof of crime so as to create a likelihood of prosecution if the answer were given. It is with this meaning that the court said the witness need "do no more than show that the answer is likely to be dangerous to him" (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262; *United States v. Zwillman*, 2 Cir., 108 F. 2d 802, 803) or that the witness must show a "setting which made it (*i. e.*, the answer) a possible step in the disclosure of a crime" (*United States v. Cusson*, 2 Cir., 132 F. 2d 413, 414).

The situation in the case at bar is closely analogous to these cases. The "setting" provided here has been reviewed in detail in Appellants' Opening Brief (pp. 14-26, 39-45). The manner in which appellants' possible answers might disclose association with a conspiracy the government claims is illegal has been explained at length (App. Op. Br. pp. 27-39, 45-50). The government has not ventured an answer to these contentions; it cannot because the facts are irrefutable. We submit that here also there has been shown the probative use to which appellants' possible answers might be put to connect appellants with an alleged conspiracy. The fear of exposure to prosecution under the Smith Act has been shown to be reasonable and likely. The facts support appellants' claim of privilege.

But the government would dispose of all these authorities by asserting that these appellants were advised that "the Grand Jury inquiry was *not* concerned with" them (Appellee's Brief pp. 19, 4-6). The government knows that it is not bound by any of these assurances to appellants. Any prosecutor who, in the course of investigating one crime, finds evidence of another is bound by his oath of office to prosecute the participants in the latter. Assurance to a witness that he at the time of interrogation is not under investigation can mean no more than just that—he is not under investigation *at that time.* Surely the government does not mean that if his answers indicate a possible connection with a crime it will not then investigate and prosecute. The assurance that a witness is not under investigation is plainly not a promise of immunity for this can come only from statutory authorization,* and the government can point to no such statute here. Were such an assurance the equivalent of a prosecutor's promise not to convict (and even the government makes no such claim) it nevertheless could not "do away with the constitutional privilege not to give evidence against himself, if he chooses to claim it" (*Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954, 964). In sum, the prosecutor's assurances to appellants and their representations to the court, below and here, that appellants were not under investigation have no legal effect upon the issues presented here.

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*See cases cited Appellee's Brief, Alexander, page 48.

III.

The Record Provides a Basis for the Claim of Privilege Against Self-Incrimination for Conspiracy to Obstruct the Administration of Justice and the Government Has Made No Answer to Appellants' Argument.

The government sidesteps appellants' arguments on this point by asserting that appellants did not claim their privilege on this ground in the trial court (Appellee's Brief p. 24). This is simply not the fact. The claim was made on their behalf by their counsel when the government sought orders compelling appellants to answer [R. 581-4] and when the civil contempts were tried [R. 496-7]. It is no answer for the government to claim that the claim was not made personally by the appellants in their statements to the judge in chambers. Not all appellants chose to make such statements, and none rested his claim of privilege on such a statement alone.

Most importantly the government did not disclose that subpoenas had been issued for Dorothy Healey, and that she therefore was part of the charged conspiracy to obstruct justice, until *after* the private statements had already been made to the judge below. The government disclosure was first made during the interrogation of appellant Blair before the grand jury on January 12, 1949, which was not read in open court until February 11, 1949 [R. 551], on the proceedings for an order compelling appellants Blair, Brodsky, Caress and Spector to answer questions.* In the same proceedings appellants' counsel

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*These began on February 11, 1949, and continued on February 18 and February 23, 1949. See R. 529, *et seq.*

asked the prosecutor to stipulate that a subpoena had been issued for Healey which he did, adding, "I have several subpoenas issued for Dorothy Healey" [R. 566]. It was in these same proceedings that appellants first asserted their claim of privilege for fear of prosecution for conspiracy to obstruct justice [R. 581-4]. In the contempt proceeding instituted on March 3, 1949 [beginning at R. 445] the claim of privilege on this ground was again asserted [R. 496-7].

The record is plain and incontrovertible that once the basis for such a claim had been laid appellants asserted it. Their claim was timely made and the basis for it amply proven.*

The government has utterly failed to answer any of appellants' arguments on this point. It can not be seriously contended that this claim of privilege could by any stretch of fancy "entirely defeat the purposes of the . . . Grand Jury" (Appellee's Brief p. 24). All agencies of government including the courts must withhold their power to force answers if they be such as might tend to incriminate. Specifically has this been held to apply to such a claim as is here advanced (*United States v. Cusson,* 2 Cir., 132 F. 2d 413). This is inherent in our system, and the frustration of an over-reaching prosecutor must not be considered the same as the subversion of a "constitutionally created body." The grand jury will survive long after history has passed by this current effort to prosecute political ideas and their advocates.

The government has not answered appellants' arguments on this point because it can not. Answers to the questions

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*The facts are reviewed in Appellants' Opening Brief, pages 40-1, 50-3.

might plainly serve as part of the probative chain to link appellants with the conspiracy which the prosecutor on oath has said exists among the people inquired about. The government's failure to answer such a contention can only be interpreted as an admission by default of the validity of the appellants' claims.

IV.

The Questions Propounded to Appellants and the Orders of the Court to Answer Them Did Call for Compulsory Disclosure of Political Opinion and Association and Contravened All of the Constitutional Charges Invoked by Appellants.

As appellants have consistently pointed out the questions propounded to them were designed to establish their connection with the Communist Party. The questions and the orders to answer them therefore were directed to the compulsory disclosure by appellants of their political affiliation, and *pro tanto,* their political opinions.

It is the position of appellants that by virtue of the First Amendment the government is without power to intrude into the area of political belief and association; that under the Fourth and Fifth Amendments citizens have a right to privacy and silence in the face of an inquiry directed at their political beliefs and associations and that such an inquiry abridges the exercise by the people of their sovereign rights reserved to them under the Constitution of the United States. It is the fundamental premise of our law that the people are the ultimate repositories of sovereignty and that they created the government as their agent charged with powers and duties designed to effectuate the public will. The government created by the American people is a government of limited

powers and the very charter of government itself reserves to the people the powers of sovereignty not conferred upon their agent, the state. Our government is a representative government in the sense that its policy is determined by the people, its agents are selected by the people and both the agents of government and the government itself are responsible to the people for the discharge of their stewardship on the people's behalf. In order that this relationship between the people and the government may be established and the sovereignty of the people preserved the Ninth and Tenth Amendments reserved to the people those powers of sovereignty not delegated to the government.

For the proper effectuation of this scheme of government it is necessary that the people be completely free to voice their will in all aspects of the determination of state policy as well as to determine their representatives in the seat of government and to obtain from them an accounting for the discharge of their responsibilities. Specifically this means that the people must be free to hold and advance such ideas and opinions as may seem to them to be valid; to discuss these ideas fully that they may accept what is sound and reject what is not; and to form such associations for the advancement of their ideas as the effectuation requires so that in a complex society the right to speak may be made meaningful.

Such a structure of government and such a relationship between the citizenry and the state can not long endure when any agency of government takes to itself the power to condemn ideas, to hold people to account for their opinions or their speech, or to interfere with the full freedom of association for the advancement of ideas. Governmental inquiry into opinion, compelled by the coercive

power of the state, as much as punishment or censorship, impedes or suppresses the exercise by the people of their sovereign rights and is destructive of the very form of government itself. The authorities appellants have heretofore cited (App. Br., Alexander, pp. 51-80) support these principles.

To this the government has made but pale answer (Appellee's Brief pp. 25-29). *Abrams v. United States,* 2 Cir., 64 F. 2d 22 (cited in Appellee's Brief p. 27) has nothing to do with the point. There the witness was asked questions concerning his position in the Democratic Party and he asserted in support of his refusal to answer *only his privilege against self-incrimination.* As the opinion shows he offered no facts in support of his claim of privilege and the court was unable to see how any answer, standing alone or coupled with other facts, could possible be used to disclose the commission of a crime or lead to the discovery of such evidence. The witness in the *Abrams* case completely failed to show any likelihood of prosecution resulting from an answer. It should be specifically noted that the case did not deal with the problem presented under this subdivision of the argument.

The government places heavier reliance upon *Barsky v. United States* (App. D. C.), 167 F. 2d 241. In that case the court stated that a congressional committee did have power to demand answers to questions concerning belief in Communism and membership in the Communist Party. The same court has reached a similar conclusion in the case of *Lawson v. United States* (App. D. C.), No. 9872, dec. June 13, 1949. These cases, however, proceed upon a completely inverted concept of the guarantees of the Bill of Rights here involved and are hardly persuasive authority. In the *Barsky* case the court reasoned that

the Congress could compel citizens to disclose belief in Communism and membership in the Communist Party because that philosophy of government constituted such an important threat to our present form of government. It was further justified on the thesis that the government had the obligation to maintain itself in order to protect the rights of the people and therefore that it is the role of the government rather than the people to determine what form of political change is advisable; that it is for the government, not the people, to initiate political change (167 F. 2d pp. 246-7). This of course runs counter to our entire constitutional tradition which is based upon the assumption that it is the people themselves, free of governmental interference, who can determine not only the policies and personnel of government but the extent and manner of changing it.

The thesis of the *Barsky* case was carried to a constitutional absurdity in the *Lawson* case where the power to ask concerning membership in the Communist Party was raised in connection with men who were writers for the screen. There the court observed:

> "No one can doubt in these chaotic times that the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world. . . . It is equally beyond dispute that the motion picture industry plays a critically prominent role in the molding of public opinion and that motion pictures are, or are capable of being, a potent medium of propaganda dissemination which may influence the minds of millions of American people. This being so, it is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions re-

quire disclosure of whether or not they are or ever have been Communists, are not pertinent questions."

The decision in this case departs from the concept that government may not regulate or otherwise interfere with the right of the sovereign people to think as they will and to say what they think. The proscription of the First Amendment that Congress shall make no law is by this decision rendered meaningless. According to the decision, the First Amendment now reads that "Congress shall make no law—except in 'chaotic times'; and, except where there is a 'current ideological struggle' in which 'the destiny of all nations hangs in balance.'" In other words, the decision declares the First Amendment to mean that the right of dissent may be maintained except when its importance becomes critical. Thus, the concept that it is the people themselves who, by the free exchange of opinion determine for themselves the vital and critical problems of their times, is transformed into the proposition that the people may decide only unimportant things and that their servant, the government, shall control what they may say and what they may think concerning matters which will determine their destiny.

Patently when the decision uses phrases like "ideological struggle" and "propaganda dissemination" it is using emotionally surcharged synonyms for words like "sharp debate" and "meaningful speech." But both sharp debate and meaningful speech are within the protection of the First Amendment even when they touch upon issues which affect the "destiny of all nations" in "chaotic times."

For as Mr. Justice Jackson phrased it in *West Virginia v. Barnette,* 319 U. S. at pages 640-642:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere

shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*" (Emphasis added.)

Nor is it possible to square at all the *Barsky* and *Lawson* decisions on the meaning of the First Amendment with the succinct language of Mr. Justice Holmes, dissenting in *Gitlow v. New York,* 268 U. S. p. 673, 69 L. Ed. p. 1149:

> "Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. *If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their say.*" (Emphasis added.)

Thus spoke a great judge who had faith in the judgment of the people during "chaotic times" not unlike the present "cold war." And it is significant that these sentiments of Mr. Justice Holmes once written for a minority have now become the accepted views of the majority of the United States Supreme Court. (See *Bridges v. California,* 314 U. S. 252, 86 L. Ed. 192; *Schneiderman v. United States,* 320 U. S. 118, 87 L. Ed. 1796; *Thomas v. Collins,* 323 U. S. 516, 89 L. Ed. 430; *Thornhill v. Alabama,* 310 U. S. 88, 84 L. Ed. 1093.)

It is these considerations that the government's brief makes no attempt to answer. They go, we submit, to the basic question of our time: whether the people have ever conferred upon the state the power to investigate into and to curb ideas and associations to advance ideas. The complete immunity of opinion and association under our constitutional system is the cornerstone of our freedom. It is more important as the Supreme Court has recently pointed out than the formal preservation of law and order as conceived by those temporarily in power (*Terminiello v. Chicago*, Supreme Court of the United States, Case No. 272, October Term 1948, dec. May 16, 1949).

Conclusion.

For all the reasons urged herein and in Appellants' Opening Brief the judgments below should be reversed.

Respectfully submitted,

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